

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES REDMOND,

Defendant-Appellant.

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UNPUBLISHED

November 14, 2006

No. 261458

Oakland Circuit Court

LC No. 04-197600-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

COOPER, J. (*dissenting*).

I must respectfully dissent because I disagree with my colleagues' analysis and conclusion in Part IV of the majority opinion, and I find this single issue dispositive.

Defendant objected at trial to the admission of the OISD resolution on hearsay grounds, and only on appeal claims a violation of the Sixth Amendment confrontation clause right. The majority therefore finds this constitutional issue unpreserved and applies the plain error standard required by *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

I would find, in light of *Crawford v Washington*, 541 US 36; 124 S Ct 1354 (2004), that a defendant's right to confront the witnesses against him or her is not so easily forfeited. In *Crawford*, defendant objected at trial to the admission of certain statements as hearsay. Justice Scalia, writing for the majority, turned the analysis toward the confrontation clause, and found that the constitutional guarantee of the right to confront witnesses takes precedence over the trial court's conclusion that evidence might be admitted if sufficient indicia of reliability are present: "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford, supra* at 67. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

This case is procedurally analogous: the prosecutor presented evidence that defense counsel objected to on hearsay grounds; the trial court admitted the evidence; the admission of the evidence violated the defendant's right to confront the witnesses against him. Because the U.S. Supreme Court found this constitutional error required reversal, even though technically unpreserved, I would follow the same analysis to the same conclusion here.

The challenged evidence in this case actually involves hearsay within hearsay: a private investigation firm investigated defendant and made a report to the Oakland Schools Board of Education; the Board formed conclusions based on that report, and captured them in the OISD resolution. The trial court admitted the resolution under the MRE 803(8) public records exception, although with some portions redacted. It is noteworthy that the remaining text is so damaging to defendant that it is difficult to imagine what could possibly have been said that was harsher so as to merit redaction. The majority correctly states that MRE 803(8) does not exclude as hearsay public records and reports “setting forth . . . matters observed.” Here the matters at issue were not observed by the declarant; rather, the report was written to summarize conclusions reached in response to observations made and described by someone other than the writer. The resolution is hearsay not covered by any exception or exclusion. Neither the investigator nor the resolution writer testified, and defendant was not afforded the opportunity to confront either person.

Even if we were to apply *Carines*, this Court has found under that analysis that “when a trial court commits an error that denies a defendant his constitutional rights under the Confrontation Clause, US Const, Am VI and Am XIV, we need not reverse if the error is harmless beyond a reasonable doubt.” *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000), citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In this case, the opinions in the resolution speak directly to the defendant’s intent, a critical element of the prosecution’s case that is not clearly corroborated by any other evidence. Admission of this evidence therefore had a devastating effect on defendant’s case, and cannot reasonably be considered harmless beyond a reasonable doubt.

The prosecutor argues that the challenged resolution was properly admitted because the defendant had introduced OISD Board meeting minutes into evidence first, thus inviting introduction of these public records. But there is a critical distinction to be made between the two pieces of evidence. Minutes of board meetings are public records of the most ordinary course, being records of what transpired in meetings, perhaps slightly colored by the conclusions and opinions of the record keeper, but accurate as to the listing of information and topics covered nonetheless. Such records are plainly kept in the ordinary course of business. The Board Resolution is not a record kept in the ordinary course of business. This particular document was drafted to summarize the board’s conclusions based on a private investigator’s report of a specific situation; clearly, the investigation and the document were executed to address a specific legal issue, defendant’s potentially wrongful conduct. Arguably, these were documents prepared with an eye toward litigation, rather than in the ordinary course of business. In any case, introduction of meeting minutes cannot be legitimately considered an invitation to introduce board resolutions.

I would find that the challenged evidence was hearsay not within any exception, and should not have been admitted. More importantly, I would find that defendant’s constitutional rights were violated, and that this particular violation is not subject to a plain error analysis. Given *Crawford*, I would find that *Carines* does not apply where a defendant’s right to confront the witnesses against him is violated by the admission of hearsay evidence, even if the defendant does not at trial object on constitutional grounds. I would find that a violation of the right of confrontation is error requiring automatic reversal. Accordingly, I would reverse this defendant’s conviction. The constitutional guarantees that define a fair trial in our justice system

merit the protection of the justice system; *Crawford* assures that the confrontation clause provides unassailable protection to criminal defendants.

/s/ Jessica R. Cooper